Competitive Carriers Association
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July 28, 2017

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: NOTICE OF EX PARTE
WT Docket No. 17-79: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment;*
WT Docket No. 15-180: *Revising the Historic Preservation Review Process for Wireless Facility Deployment;*
WC Docket No. 17-84: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment.*

Ms. Dortch:

Rebecca Murphy Thompson, EVP & General Counsel, Tim Donovan, SVP of Legislative Affairs, Courtney Neville, Policy Counsel, and I, with Competitive Carriers Association ("CCA"),[1] met with Claude Aiken and Daudeline Meme, Advisors to Commissioner Clyburn, and Jeremy Greenberg, Intern with Commissioner Clyburn's office, on July 26, 2017, to discuss infrastructure issues addressed in the docketed proceedings. Maribeth Collins, Director of Legislative Affairs, and I met with Amy Bender and Erin McGrath, Advisors to Commissioner O'Rielly, and separately with Lyle Ishida, Acting Bureau Chief, and Dan Margolis, Legal Advisor, both of the Office of Native Affairs and Policy, on July 27, 2017. CCA encouraged the Commission to quickly update and strengthen national siting rules. Although the Chairman's newly-created Broadband Deployment Advisory Committee will certainly influence the Commission's infrastructure policies, such as Commission-endorsed model siting codes, the record depicts an undisputed immediate need for updated and streamlined rules.

CCA expressed support for many of the Commission's proposals, especially the need for historic review reform and clarification. CCA explained the need for the Commission to explicitly

[1] CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

provide that Tribal fees, including up-front "review" fees along with fees related to site monitoring, are not required for historic review compliance. This is appropriate considering no Commission rule, Advisory Counsel for Historic Preservation ("ACHP") rule, or the National Historic Protection Act ("NHPA") itself, requires fees for compliance. Tribal fees are rising, and are typically assessed before any Historic Property is suspected or found. Tribal Nations have not explained these rising fees, and allowing unlimited siting fees stands contrary to the Commission's ultimate goal: ubiquitous broadband deployment. Equally important, the Commission should not allow, as is current practice, the siting application processing to stall until applicants conduct a customized cultural review, at least before Historic Property is evinced.[2] To that end, CCA stressed the need for explicit clarification on these issues.

CCA also suggested that the Commission rework the Tower Construction Notification System ("TCNS"). It is important that the Commission ensure Tribes more precisely identify areas of interest, at least on a county basis, but ideally only where Tribes can show or certify the presence of actual or eligible Historic Property. The Commission also should more precisely define the appropriate scope of information applicants must submit to Tribal Nations and State Historic Preservation Officers, and associated timing. Tribes should then be allotted no more than 30 days to review the information and respond with evidence of potential or actual Historic Property. CCA stands willing to work with the Commission to streamline and make more efficient TCNS and the historic review process, recognizing the multifaceted issues involved.

CCA discussed the need for broader siting exclusions, focusing on small cell and distributed antenna system ("DAS") historic review exclusions. Limiting review for this non-intrusive network architecture is necessary to support next-generation deployment, and to meaningfully reform the TCNS process. The Commission should exclude small cell and DAS deployments from the definition of "federal undertaking" under the NHPA[3] or more uniformly exclude these deployments

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[2] *See* Comments of Competitive Carriers Association, WT Docket No. 17-79, WC Docket No. 17-84, at 36 (filed June 15, 2017) ("More precisely, [under the National Programmatic Agreement] applicants are instructed to 'seek guidance' from the FCC in the event of 'any substantive or procedural disagreement…or if the Indian tribe or NHO does not respond to the Applicant's inquiries.' But, if there is a disagreement regarding 'identification or eligibility of a property,' the FCC must use ACHP's rules. A dispute resolving fees would seem to be a 'substantial or procedural disagreement,' that the FCC is empowered to resolve under the NPA, so long as the issue is detached from a dispute regarding 'identification or eligibility of a property'"), *citing* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App'x C, § IV.G ("NPA").

[33] *See* Reply Comments of Competitive Carriers Association, WT Docket No. 17-79, WC Docket No. 17-84, 25, fn. 104 (filed July 17, 2017), *citing* Comments of PTA-FLA, WT Docket No. 17-79, at 3-5 (filed June 15), *citing CTIA-The Wireless Association v. FCC*, 466 F.3d 105, 113-114 (D.C. Cir. 2006) (arguing that the Commission has conflated its authority to subject deployments to historic review, since it ability to do so is only permitted when a tower registration is actually required); *see also* Comments of Sprint Corporation, WT Docket No. 17-79, WC Docket No. 17-84, at 32, fn. 39 (filed June 15, 2017); Comments of the Critical Infrastructure Coalition, WT Docket No. 17-79, at 15 (filed June 15, 2017) (The Commission should exclude from its review all structures that do not require an Antenna Structure Registration).

from historic review.[4] Both actions are supported in the record[5] and within the Commission's authority.[6] More broadly, the Commission should exclude deployments in previously-reviewed areas, disturbed grounds, in commercial or industrial areas, and other areas where there is a low probability that Historic Property is present or would be disturbed.[7]

Regarding state and local siting barriers, CCA urged the Commission to adopt a "deemed granted" remedy when Section 332[8] shot clocks expire, and shorten shot clocks to 30 days for

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[4] *See* NPA; *see also* Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, App'x B *and Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas,* Public Notice, 31 FCC Rcd 4617 (WTB 2016).

[5] *See, e.g.,* Sprint Comments at 30 (noting that "Antenna construction is an infinitesimal share of all ground disturbance in this country in comparison to agriculture, housing construction, shopping malls, roads, electrical transmission towers, stadiums, parking lots, etc., none of which require historical or tribal review…[T]he current system [wrongly focuses on] the pinprick footprints of poles to support antennas while ignoring almost all other ground disturbing activities across the nation").

[6] First, if small cells and DAS are indeed a federal undertaking, the Commission is empowered to reframe the scope of what activities are considered a federal undertaking under its jurisdiction. *See* NPA § I.B ("The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA. Nothing in this Agreement shall preclude the Commission from revisiting or affect the existing ability of any person to challenge any prior determination of what does or does not constitute an Undertaking"); *see also* 36 CFR § 800.3 (the FCC may "determine whether the proposed Federal action is an undertaking…and, if so, whether it is a type of activity that has the potential to cause effects on historic properties"). Alternatively, the Commission may decide that a federal undertaking is not subject to the historic review process at all, as small cells and DAS are not "a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present." *See* 36 CFR § 800.3(a)(1). Or, the Commission may more uniformly exclude small cell and DAS deployments in the NPA, especially considering broad record support testifying to their minimal to nonexistent impact on Historic Property. The ACHP's rules governing program alternatives like the NPA specify that a federal agency may "propose a program or category of undertakings that may be exempted from review" if the provided criteria is met; in pertinent part, if the "potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse." *See* 26 CFR 800.14(c)(1); *see also id.* at (c)(1)(ii). This certainly is true of small cells and DAS, and the Commission should not hesitate to make this determination.

[7] The ACHP's recently adopted Program Comment for federal lands siting has a similar provision. Under the Program Comment, the agency may notify consulting parties that "no further Section 106 review will be required" where the Area of Potential Effects ("APE") "has been previously field surveyed," "previously disturbed to the extent and depth where the probability of finding intact historic properties is low," or "that is not considered to have a high probability for historic properties." This analysis is made before the agency checks whether the site is eligible for other conditional exemptions. *See Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property*, Advisory Council on Historic Preservation, 82 FR 23818, 23824-5, §IV(A)(3) (May 24, 2017), https://www.federalregister.gov/documents/2017/05/24/2017-10630/notice-of-issuance-of-program-comment-for-communications-projects-on-federal-lands-and-property.

[8] 47 U.S. Code § 332 ("Section 332").

collocations and 60 days for all other deployments.[9] The Commission also should clarify that shot clocks begin when an application is filed, and can only be suspended where: (1) an applicant fails to respond to an additional information request rooted in statute or printed in the application itself within three days; or (2) there is an actual emergency (*i.e.*, a state or federal declared natural disaster).

CCA reiterated how interpreting uniformly shared language in Sections 253[10] and 332 regarding rules that "prohibit" deployment will streamline nationwide siting. The Commission should clarify the applicable standard, using the language in *California Payphone*.[11] A non-exhaustive list of practices that are "prohibitive" should accompany the Commission's statutory clarification, including *de facto* and *de jure* moratoria, application requirements to prove coverage needs, application requirements to justifying network design, and exorbitant, arbitrary fees. CCA discussed the need to eliminate or at least seriously curb siting consultants' harmful influence on broadband deployment. Consultants handling siting applications on a locality's behalf, frequently working on a contingency basis, sharply escalate siting fees far beyond costs of review or reasonable consulting costs. CCA cited adopted legislation from Arizona,[12] North Carolina,[13] and Iowa[14] to illustrate how individual states are aware of the problem and are addressing consultant-related fee issues.

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[9] *See* Comments of Competitive Carriers Association, WT Docket No. 17-79, et. al., at 7-12 (filed June 17, 2017) (explaining that the Commission has the authority to again interpret Section 332(c)(7)(B), and arguing that adopting a deemed granted remedy would, rather than divest authority from the courts, simply reframe the legal question for review to whether the shot clock was correctly applied).

[10] *Id.* § 253 ("Section 253").

[11] A prohibitive practice is one that either: (1) materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment; or (2) creates a substantial barrier to entry into or participation in the provision of telecommunications. *See California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, ¶ 38 (1997).

[12] *See* Ariz. Rev. Stat. Ch. 13, Art. 1, 11-1803 § I (2017) ("An application fee may not include: (1) Third-party travel expenses that are incurred to review application. (2) The direct payment or reimbursement of third-party rates or fees that are charged on a contingency basis or pursuant to a result-based arrangement"); *see also id.* § J ("The total application fee, if allowed, may not exceed one hundred dollars each for up to five small wireless facilities addressed in an application and fifty dollars for each additional small wireless 23 facility addressed in the application"), https://legiscan.com/AZ/text/HB2365/id/1482295.

[13] N.C. Gen. Stat. § 160A-400.54(f) (2017) ("A city may impose a technical consulting fee for each application, not to exceed five hundred dollars ($500.00), to offset the cost of reviewing and processing applications required by this section. The fee must be based on the actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of an application. A city may engage an outside consultant for technical consultation and the review of an application. The fee imposed by a city for the review of the application shall not" include consultants' travel expenses or payments "based on a contingent fee basis or results-based agreement"), http://www.ncga.state.nc.us/Sessions/2017/Bills/House/PDF/H310v7.pdf.

[14] Iowa Code §3. AC.7A(c)(1) (2017) ("An applicant shall not be required to provide more information or pay a higher application fee, consulting fee, or other fee associated with the processing or issuance of a permit

The Commission also should clarify that Section 253's limit on "fair and reasonable compensation" to right-of-way ("ROW") access denotes publicly-available fees and rents that are tied to direct application review and site maintenance costs. Relatedly, the Commission should provide guidance that "competitively neutral and nondiscriminatory" fees under Section 253 do not allow charges imposed on a provider for ROW access may not exceed the charges imposed on other providers for similar access, and "competitively neutral and nondiscriminatory" management should explicitly prohibit localities from unlawfully discriminating between different types of providers (*e.g.*, wireless versus wireline).

This *ex parte* notification is being filed electronically with your office pursuant to Section 1.1206 of the Commission's Rules. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

/s/ Elizabeth Barket

Elizabeth Barket
Law & Regulatory Counsel
Competitive Carriers Association

CC: Claude Aiken
Daudeline Meme
Jeremy Greenberg
Amy Bender
Erin McGrath
Lyle Ishida
Dan Margolis

than the amount charged to a telecommunications service provider that is not a wireless service provider"), https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=SF%20431.